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No. 80-1306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DIANE DOE, by Robert Doe and Naomi Doe,
Her Parents and Next Friends,

Petitioner,

vs.

OMER RENFROW, Individually and as Superintendent of Schools of the Highland Community School Corporation; GEORGE KURTEFF, Individually and as Principal of Highland Senior High School; HARVEY KEIM, Individually and as Principal of Highland Junior High School; JOHN GUIDEN, LORRAINE KING, LAWRENCE VASSAR, BURTON MASEPOHL, and JOHN TERPSTRA, Individually and as Members of the Board of Trustees of the Highland Community School Corporation; NOEL HALL, as a Member of the Board of Trustees of the Highland Community School Corporation; AL PRENDERGAST, Individually, as Chief of Police of Highland, Indiana, and as a Member of the Board of Trustees of the Highland Community School Corporation; JAMES TUROCI, as Chief of Police of Highland, Indiana; and PATRICIA LITTLE, Individually and as Deputy Sheriff of Miami County, Indiana,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION (BY RESPONDENTS, THE SCHOOL OFFICIALS)

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourth Amendment prohibit public school officials from bringing trained dogs (and their volunteer handlers) into the school to combat increasing drug use in the school?

2. Is there a search within the meaning of the Fourth Amendment when, at the request of school officials, trained drug-sniffing dogs are walked through the aisles of a classroom where students are sitting?

3. Is such a "search" unreasonable when the sole purpose of the operation is to re-establish a sound educational environment, and when by agreement with police no arrests are made, and when increasing drug traffic had been seriously disrupting the educational environment?

4. Does "reasonable suspicion" to believe drugs are present justify a search of pockets and purses of individual students selected by the trained dogs?

5. Does a dog's alert provide "reasonable suspicion" for a pocket search?

There is no issue concerning any strip search: the trial court, affirmed by the court of appeals, held that the nude search of the Petitioner, based upon the dog's signal alone, was unreasonable and violated her constitutional rights; Respondents have never appealed this holding.

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

Petitioner's statement of the case in her Petition for Certiorari paints a picture of governmental terrorism which is in

marked contrast to the record and to the detailed findings of facts in the memorandum and order of the district judge, dated August 30, 1979.[1]

Confronted with pleas from parents and innocent students to do something about the increasing drug use on the campus, the school officials of the Town of Highland, Indiana, decided in March, 1979, to bring dogs onto the campus and into the classrooms to locate controlled substances.

Students testified at the injunction trial that every day there were some students in every class under the influence of drugs. (Tr. 348, 356). The use of drugs in the school caused class disruption, interference with teaching, lowering of morale, and physical danger to the students and the teachers. (Tr. 137-38, 206-207, 347-348). Peer pressure, plus ready availability of drugs, enticed youthful non-users to experiment with drugs; (Tr. 80, 137, 357); children were being introduced to drugs as early as the seventh grade. (Tr. 352, 258). The canine operation was planned by the school because there had been a marked upsurge in drug possession and drug use within the three weeks prior to March 23, 1979.

The district court found that this was not a police action. (p.16a of Appendix to Petition). The school officials requested that the Highland Police Department assist the school officials

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[1] The findings of fact by the district court are found at Appendix 1a to the Petition herein. The Petition for Certiorari is misleading to the Court: The statement of questions presented begs the question of whether the scrutiny of a dog is a search. Petitioner erroneously states that there were pat-down searches. Petitioner erroneously states that two students were wrongfully accused of drug possession. Petitioner erroneously states that no provisions were made for washroom visits by students. Petitioner erroneously states that there was no suspicion of drug traffic in the school. Petitioner erroneously states that one of the dog handlers carried a weapon at the school. Petitioner never mentions the purpose of the school officials, and that police officers were asked to be present only after an agreement that no arrests would be made and no prosecutions would result.

by helping to arrange for the presence of volunteer trained canine units, and by being present on the school campus during the canine inspection to maintain order. It was unpaid volunteers who walked the dogs through classrooms, not police. As was expressly agreed beforehand, no arrests and no prosecutions took place. The purpose of bringing the canines to the school was to provide the best possible educational atmosphere for the students; the school officials were concerned with maintaining an educational environment conducive to learning. (Tr. 104, 134).

Each student was asked to remain in his homeroom period, or first period class, for an extra one-and-one-half hours.[2] (Tr. 73). During this extended first period class, one dog visited each classroom for a period of about three to five minutes. The dogs simply walked with their handlers up and down each aisle of the classroom. (Tr. 60-61). While Petitioner claimed a dog touched her leg, there is no testimony that dogs touched other students, or that such behavior is usual to this procedure. The district court made no finding of fact on this subject.[3]

The students in the classrooms took the appearance of the dogs in a very good humor. (Tr. 83, 346). There was no terror, humiliation, or embarrassment. (Tr. 346, 355). The students petted the dogs. (Tr. 310). Petitioner herself was not frightened of the dog which visited her classroom. (Tr. 84). A pleasant atmosphere was maintained in each classroom. (Tr. 347). The record negates an atmosphere of fear or apprehension. (Tr. 94, 312, 346, 355). The record contains no evidence that any student suffered any psychological trauma, or that the dog teams caused any incident of disruption. (Tr. 210).

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[2] Teachers were asked to maintain performance of ordinary school work. (Tr. 179)

[3] In this one day injunction trial, there was no evidence presented as to how a dog signals his alert, and no evidence as to whether the dog could smell drug odors undetectable by the human nose. There was no technical evidence.

On March 23, 1979, seventeen students (not including petitioner) were found by the dogs to be in possession of controlled substances or drug paraphernalia. All disciplinary action was taken in accord with due process requirements. (Tr. 147, 199-202). Two students who only had possession of drug paraphernalia were suspended for five days and reinstated; twelve students voluntarily withdrew from school; three were expelled. (Tr. 147, 199-202). The Petitioner was not disciplined. No one was arrested or prosecuted.

The district court found that the dogs were properly trained. The dogs "alerted" to about 50 students. An alert signals to the handler that the dog smells a drug. Upon an alert, the dog handler asked the student to empty his pockets or her purse. This limited search is justified by the alert of the trained dog. Respondents do not seek to validate the more extensive searches which were done on a few students because of the dogs' continued alert. However, Respondents maintain they acted in good faith, as the district court found.

A one-day injunction trial was conducted June 7, 1979. Respondents reserved their right to jury trial on the issues of liability and damages. (Tr. 39). The district court denied injunctive relief, declared the nude body search unlawful, and granted summary judgment *sua sponte* to the Respondent school officials on the issue of damages, on the basis that the school officials acted in good faith. The summary judgment was reversed by the court of appeals; the school officials are entitled to a full trial on all issues of liability and damages.

The district court, as affirmed by the court of appeals, reasoned that the use of the dogs up until the pocket search was a minimal intrusion of the students' expectations of privacy when weighed against the school's need to rid itself of the drug problem, and that the actions of the school officials were reasonable and not a search for the purposes of the Fourth Amendment; the pocket search was held to be authorized on the grounds that the alert of a dog provided reasonable cause to believe that the student was concealing narcotics.

SUMMARY OF ARGUMENT

Setting

Because of increasing drug use and traffic in the school, and because of consequent disruptions in the classrooms, the local school board decided to bring marijuana-sniffing canines to the school. The sole purpose of the operation was to restore a proper educational environment. No arrests were made, by pre-agreement with law enforcement authorities. The operation was performed during the first two class periods, during regular school time.

Other remedies had been unsuccessful; peer pressure and fear of violence prevented students from informing school officials about drug users and pushers.

Scrutiny By A Dog Is Not A Search.

The dogs merely walked the classroom aisles with their handlers, not touching the students. Petitioner, alone, contends she was touched by a dog, but this was when the dog alerted to her. The sniffing of the air in the aisles of classrooms was insufficient intrusion on the privacy of students to constitute a "search" of the students. Respondents submit that the actions of the dogs on the date in question could have presented a minor annoyance to some students, but that a person is not "searched" when a dog sniffs the air surrounding the person. The seven circuits which have considered the question have held that a dog's sniff is not a search.

The Operation Was Reasonable.

When a dog alerted to a student, the student was asked by the volunteer dog handler to empty his pockets or her purse. This occurred fifty times on March 23, 1979. While this was a search, each such search was justified by the alert of the trained dog.

Had the lower courts held that the sniffing of the air next to a student's desk was itself a "search", then such an inspection was reasonable because of the circumstances:

—The dog teams were invited by school officials, who stand in *loco parentis* to the students.

—The sole purpose for initiating the inspection was to restore a decent educational atmosphere.

—By pre-agreement with local law enforcement authorities, no arrests were made.

—The dog inspection was conducted by volunteer dog handlers, not by police.[4]

—An upsurge of drug use in the school was seriously disrupting the educational environment.

—Drug traffic, as well as use, was taking place on the school campus, which is the primary place of interaction between teen-agers.

—The extent of intrusion was minimal; a dog was present in each classroom from three to five minutes, and simply walked past the great majority of students.

The lower courts balanced the school's *loco parentis* interest in maintaining an educational atmosphere against the individual student's reasonable expectation of privacy. They correctly held that, until the nude search incident, the school officials had not violated the Fourth Amendment guarantee against unreasonable searches.

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[4] The later nude search of Petitioner was physically performed by two female employees of the local police department, who were not police officers. This was, admittedly, a violation of Petitioner's rights. Otherwise, policemen were only invited to be present to maintain order—which was the daily function of one police officer, for six years before this dog operation. (Tr. 257).

In balancing our personal rights against the current needs of the community, the Court recognizes that what might be an unreasonable intrusion at a city street corner could be justified at the border, at a roadblock, in a detention facility, or in an airport.

The public school situation, with its special goals and hazards, is different from all of these points of reference. Respondents respectfully suggest that criminal law standards should not be injected in bulk into the school setting. The Court should allow the lower courts to develop standards and guidelines for canine-assisted drug inspections in schools.

ARGUMENT—REASONS FOR DENYING THE WRIT

I.

THE LOWER COURT JUDGMENTS ARE CORRECT AND DO NOT CONFLICT WITH DECISIONS OF THIS COURT.

A. Until a Pocket Search Occurred, There Was No Search or Seizure Within the Meaning of the Fourth Amendment.

Arguing that she was the victim of unreasonable seizure, Petitioner complains that she was required to spend an extra 95 minutes in her mathematics class, primarily doing mathematics work. Before the day in question, school officials routinely regulated the movement of the students in the school building; the school determined the time periods allocated for each class, the room in which a given class would be held, and the times and places for general assemblies. It was not unusual for students to be kept in their classrooms longer than the normal periods. Such regulations of a student's movement do not deny the student any constitutionally guaranteed right. Petitioner presented no evidence of discomfort resulting from the extra time spent in this classroom; arrangements were made by school officials to accommodate students who wanted to visit the washroom.

The first genuine question in this case is whether the sniffing action of a dog in the aisles of a classroom itself constitutes a search.

The circuit courts have consistently held that the sniffing of an object by a dog does not constitute a search. *United States* v. *Goldstein*, 635 F. 2d 356 (5th Cir. 1981); *United States* v. *Klein*, 626 F. 2d 22 (7th Cir. 1980); *United States* v. *Sullivan*, 625 F. 2d 9 (4th Cir. 1980); *United States* v. *Venema*, 563 F. 2d 1003 (10th Cir. 1977); *United States* v. *Solis*, 536 F. 2d 880 (9th Cir. 1976); *United States* v. *Bronstein*, 521 F. 2d 459 (2d

Cir. 1975); *cert. den.*, 424 U. S. 918 (1976); *United States* v. *Fulero,* 498 F. 2d 748 (D. C. Cir. 1974). In these cases, luggage, crates, and lockers were inspected by dogs. There is no conflict among the circuits.

The only other case in any court dealing with people rather than objects is the case of *Jones* v. *Latexo Independent School District,* 499 F. Supp. 223, 233 (E. D. Tex. 1980), holding that the sniffing of a student by a dog constituted a search. No appeal was taken from the Texas district court order granting a preliminary injunction. The case is pending for trial on the damage issues. A subsequent opinion from the Fifth Circuit Court of Appeals shows that the *Jones* opinion is not likely to endure: in ruling a search occurred, the *Jones* court rejected the rule that marijuana (with its pungent aroma) is within the "plain smell" of an officer. *E.g., United States* v. *Bronstein,* 521 F. 2d 459, 461 (2d Cir. 1975); that "plain smell" reasoning has now been approved by the Fifth Circuit in *United States* v. *Goldstein,* 635 F. 2d 356, 361 (5th Cir. 1981).

In the case at bar, the dogs merely walked up and down the classroom aisles (three to five minutes in each classroom) with their handlers. Students were not touched by the dogs. Petitioner contends that she was touched by a dog, but this was only when the dog alerted to her.

The action of the dogs is more like observation than exploration. Missing from the record is any evidence of traumatic psychological effects resulting from the visits of the dogs to the classrooms. There is insufficient intrusion to regard this as a search within the meaning of the Fourth Amendment.

B. The Dog "Search" Was Reasonable.

Balancing the personal rights of the students against the school's interest in re-establishing an educational atmosphere, the dog operation would be reasonable, even if it were considered a "search" within the meaning of the Fourth Amendment.

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. The courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted. *Bell* v. *Wolfish,* 441 U. S. 520, 559 (1979).

Depending on the setting, the circumstances, the person performing the search, and the evil to be combated, specific articulable facts against a certain individual need not be present as a prerequisite to a constitutional search. In the case of *United States* v. *Martinez-Fuerte,* 428 U. S. 543 (1976), the court held, weighing the public interest against the Fourth Amendment interests of the individual, that "reasonable suspicion" was *not* necessary to stop all vehicles at a border-related check-point. Unrelated to crossing of international borders, the court suggested in *Delaware* v. *Prouse,* 440 U. S. 648 (1979), that the detention and questioning of all traffic at a roadblock (as distinguished from random stops) would be authorized. Individual-directed suspicion is not always a prerequisite to a constitutional search or seizure. *See, e.g., Bell* v. *Wolfish,* 441 U. S. 520 (1979) [pretrial detainees]; *State* v. *Silvernail,* 25 Wash. App. 185, 605 P. 2d 1279, 1982-82 (1980) [a roadblock].

The above cases all deal with arrest and prosecution. This is a case involving school action by school officials for a school purpose. The Court of Appeals for the Seventh Circuit declined to apply criminal law standards in a wholesale fashion to the school setting. The circuit court affirmed Judge Sharp's holding in this case that there was no *unreasonable* search or seizure.

First examining the school's reason for initiating the dog operation, we see that a drug problem in school is a serious problem.

> The detrimental effects of drug abuse on an individual's capacity to learn and function in an academic environment is obvious. There is just no way to teach a student who is sedated, high, drunk or a combination of all three. Beyond the individual tragedies involved, however, there are disturbing indications of some parallels between substance abuse and incidents of violence and vandalism in schools. *Challenge for the Third Century: Educations in a Safe Environment—Final Report on the Nature and Prevention of School Violence and Vandalism; Report of the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary (95th Congress, First Session) at 29.*

The evidence at trial showed that there had been an upsurge of drug use in this school, which was seriously disrupting the educational environment. Students testified that the campus was a center for drug traffic and that students were under the influence of controlled substances in each class. With this recently accumulated history, the dog operation was planned and executed by school officials, with the assistance of volunteer handlers, as follows:

> —The dog teams were invited by school officials, who stand in *loco parentis*[5] to the students.
>
> —The sole purpose for initiating this action was to restore a decent educational atmosphere.
>
> —By pre-agreement with local law enforcement authorities, no arrests were made.
>
> —The dog inspection itself was conducted by volunteer dog handlers and not by police.
>
> —A dog was present in each classroom from three to five minutes and simply walked past the great majority of students.

---

[5] Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 192 N. E. 2d 740, 743 (1963).

Both lower courts found that this was a school operation and not a police action. No other course of action had been successful in eliminating the drug problem from this school; peer pressure and fear of violence prevented students from informing school officials about drug users and pushers.

Petitioner suggests that the school officers should have specific and articulable reasons for suspecting a particular student possesses a controlled substance before a trained dog is summoned. Respondents believe that if they had such probable cause, or even reasonable suspicion as to a particular student, a search reasonable in scope could be conducted without corroboration from any dog. Given that the school had independent evidence indicating spreading drug abuse within the school, the lack of information about specific students does not make the dog operation unreasonable. Quoting the district court:

> [I]n a public school setting, school officials clothed with the responsibilities of caring for the health and welfare of the entire student population, may rely on such general information to justify the use of canines to detect narcotics. *Doe* v. *Renfrow*, 475 F. Supp. 1012, 1021. (p. 16a of the Appendix to Petition).

While the decision in *Jones* v. *Latexo Independent School District*, 499 F. Supp. 223 (E. D. Tex. 1980), on its face contains an opposite holding, the Texas decision contains language which distinguishes it from the case at bar on the issue of balancing private rights against community interests:

> It should be noted that the strong evidence of widespread drug abuse at the high school inspected in *Doe* v. *Renfrow* far exceeded any evidence that Latexo students were using drugs. While this distinction is not, in itself, dispositive, it would necessarily alter the *ad hoc* balancing required to be carried out in assessing reasonableness on the facts of each case. *Jones* v. *Latexo Independent School District*, *supra* at 236, n. 12.

C. Pocket Searches Were Reasonable.

A search did occur on 50 occasions when, in response to a dog's alert, a student was asked to empty his pockets or her purse. Each such search was reasonable, based upon the alert of a trained dog. There were no pat-down searches; the pocket and purse searches were only conducted after a certified dog had alerted to a student.

An odor can furnish probable cause for a search. *Johnson* v. *United States,* 333 U. S. 10 (1947). While most cases involve advance "tips" to authorities, it has been consistently held that the alert of trained dogs provides probable cause for a search, a seizure or an arrest. *See, e.g., United States* v. *Bronstein,* 521 F. 2d 459 (2d Cir. 1975).

In the school setting, most courts hold that reasonable suspicion justifies a search; probable cause is not required. *Bellnier* v. *Lund,* 438 F. Supp. 47 (N. D. N. Y. 1977); *M.* v. *Bd. of Education,* 429 F. Supp. 288 (S. D. Ill. 1977); *State* v. *McKinnon,* 88 Wash. 2d 75, 558 P. 2d 781 (1977); *State* v. *Young,* 234 Ga. 488, 216 S. E. 2d 586 (1975); *People* v. *Scott D.,* 34 N. Y. 2d 483, 358 N. Y. S. 2d 403, 315 N. E. 2d 466 (1974); *People* v. *Jackson,* 319 N. Y. S. 2d 731 (S. Ct. 1971), *aff'd.* 30 N. Y. 2d 734, 284 N. E. 2d 153 (1972); *State* v. *Baccino,* 282 A. 2d 869 (Del. Sup. 1971); *Moore* v. *Student Affairs Committee of Troy State Univ.,* 284 F. Supp. 725 (M. D. Ala. 1968).

The pocket searches were reasonably justified by the alert of the trained dogs; the alert of a dog provides reasonable suspicion for a pocket search. The fact that 17 students were found to be in possession of controlled substances or drug paraphernalia, out of 50 alerts, does not vitiate the reasonableness of the searches. *See, United States* v. *Albarado,* 495 F. 2d 799, 806 (2d Cir. 1974), dealing with the relatively small number of weapons detected by airport magnetometers.

II.

RULES AND GUIDELINES ARE JUST BEGINNING TO EVOLVE IN THE LOWER COURTS—THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

School use of canines, conducting general investigations for drugs, has been the subject of only two circuit court opinions. The first is in this case, *Doe* v. *Renfrow;* the second was decided by the Tenth Circuit in January, 1981. *Zamora* v. *Pomeroy,* ____ U.S.L.Week ____, (10th Cir., docket #79-1611, Jan. 26, 1981). In *Zamora,* school officials asked police officers to bring dogs into the school, without specific information against any particular students, to sniff lockers for drugs. Marijuana was found in plaintiff's locker, which was opened by school officials without any warrant. Plaintiff was expelled. The Tenth Circuit held that the doctrine of *loco parentis* expands the authority of school officials; there is a relaxed test of reasonableness when a court examines alleged infringement of a student's Fourth Amendment rights in the school context.

The only other case dealing with dogs in schools is the above-discussed case of *Jones* v. *Latexo Independent School District,* 499 F. Supp. 223 (E. D. Tex. 1980).

Respondents respectfully suggest that the Court deny this Petition for Writ of Certiorari, wait, and allow the various circuit courts to digest the entire question of dog inspections in the schools. The courts of appeals can formulate standards and establish guidelines for reasonable use of canines. The courts of appeals can strike a balance between the educational interests of the school officials and the private rights of the students.

CONCLUSION

This is a case of school action by school officials for a school purpose.

Police can conduct an extensive search of pretrial detainees, without probable cause against a particular individual; police can make a limited search of all airplane passengers, again without specific facts against an individual. In such special settings, the serious reason for the search is said to justify the inspection, to make it reasonable.

Here, Respondents submit, the school had a terribly heavy responsibility coupled with a frightening drug problem—the lower courts were correct in relaxing the test of reasonableness in the school setting. The Fourth Amendment requires the courts to balance the public interest of good education against the students' freedom from unreasonable intrusion. Where drugs are involved, the actor is the school official, and the setting is the school classroom, Respondents submit that use of canines to find contraband is not a "search" of students, and certainly not an unreasonable intrusion upon the privacy of a student.

The Petition for a Writ of Certiorari should be denied. The circuit court opinion should stand, and the various circuits should be allowed to formulate rules for future drug investigations in the schools and the use of canines in and about the schools.

Respectfully submiited,

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